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No. 98-1696

Supreme Court, U.S.
FILED
NOV 19 1999
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in the

Supreme Court

of the

United States

October Term 1998

UNITED STATES OF AMERICA,

Petitioner,

vs.

ROY LEE JOHNSON

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether a federal criminal defendant should be given credit against a term of supervised release for time spent in prison later determined to have been improperly served.

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STATEMENT

Following a jury trial in the District Court for the Eastern District of Michigan, Respondent Roy Lee Johnson was convicted on November 27, 1990, of two counts of using a firearm in relation to a drug trafficking offense (18 U.S.C. § 924(c)), two counts of possession with the intent to distribute a controlled substance (21 U.S.C. § 841), and one count of felon in possession of a firearm (18 U.S.C. § 922(g)). As a result of these convictions, Respondent was sentenced on January 25, 1991 to 51 months on the possession charges, and two consecutive 60 month sentences on the 924(c) counts, for a total sentence of 171 months.

Respondent appealed his conviction to the Sixth Circuit Court of Appeals (91-1200,91-1201), and on June 16, 1994, that court remanded the case, ordering that the sentences on the § 924(c) convictions be imposed to run concurrently. Respondent was subsequently resentenced on August 30, 1994

to a term of 111 months incarceration. Pet. App. 11a.

Respondent then filed into district court a motion pursuant to 28 U.S.C. § 2255, raising the following issues:

I. His § 924(c) counts should be vacated due to new Supreme Court precedent of *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995);

II. His conviction was invalid due to counsel's failure to raise a *Batson* challenge;

III. His conviction was invalid due to counsel's failure to pursue a motion to suppress;

IV. The sentence imposed by the court violated due process;

V. That an evidentiary hearing was required.

A motion for bond pending the outcome of the § 2255 motion was also filed. Pet. App. 12a.

On May 2, 1996, the district court held a hearing on the bond motion, and at that hearing, granted Respondent's first claim in

the § 2255 petition. The court vacated the § 924 convictions, and ordered Respondent's immediate release, as he had served more time than was required under the revised sentence. Pet. App. 12a.

On June 7, 1996, Respondent filed a motion requesting that the balance of any supervised release term be vacated, to account for the additional period of incarceration he served beyond what could have been imposed under a correct application of § 924(c). On January 22, 1997, the district court filed an order denying all other portions of Respondent's § 2255 petition, and denying the motion for termination of supervised release. Pet. App. 9a-17a. The district court found that the purposes of supervised release were not met by Respondent's incarceration, and that the language of the statute required the term to run when Respondent was actually released from incarceration. Pet. App. 15a-16a.

Respondent appealed this denial to the

Sixth Circuit Court of Appeals. The court considered the provisions of 18 U.S.C. § 3624(e), which state "a term of supervised release commences on the day the person is released from imprisonment," and that a "term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime." The court acknowledged that when read in isolation, 18 USC § 3624(e) would appear to restrict crediting against a term of supervised release, the additional time erroneously incarcerated. The court held, however, that § 3624(e) should be read in conjunction with § 3624(a), which requires that an inmate "be released by the Bureau of Prisons on the date of the expiration of prisoner's term of imprisonment," thereby giving effect to Congress's intent that a prisoner be released from prison upon the expiration of a valid sentence. Reading the statute in this manner would be appropriate as Congress

had not anticipated the effect of a retroactive invalidation of sentences when drafting the statute. The court held that "Respondent was not imprisoned in connection with a conviction for a Federal . . . crime' during the these two and a half years because the conviction for which he was being held was invalid." The court also concluded that Respondent's date of release for purposes of the statute "was the date he was entitled to be released rather than the day he walked out the prison door." Pet. App. 4a-5a. The Respondent's supervised release was thus vacated. A petition for rehearing en banc by the United States was denied on January 21, 1999.

ADOPTION

The Respondent agrees with the accuracy of Petitioner's Opinions Below, Statutory Provisions, and Jurisdictional statement, and adopts those as his own.

SUMMARY OF ARGUMENT

Respondent submits that 18 U.S.C. § 3624 is ambiguous, in that it contains provisions which in the Respondent's case lead to contradictory results. The Respondent further contends that if this Court would find that the statute is not ambiguous, then its application as the United States suggests is contrary to the intent of Congress, as expressed in its enactment of 18 U.S.C. § 3742 and 28 U.S.C. § 2255, and therefore, it should be applied based upon Congress's intent, instead of the strict language of the statute.

Further, the Respondent submits that this Court's precedent supports an argument that credit should be given against post-incarceration supervision for an erroneous sentence. Further, the provisions of supervised release would not be addressed by granting the United States relief in

this case.

18 U.S.C. § 3583 is unavailing to assist the Respondent, as it does not provide immediate relief, and provides too much discretion on the part of the district court to rely upon for relief.

ARGUMENT

A federal criminal defendant should be given credit against a term of supervised release for time spent in prison later determined to have been improperly served

A. 18 U.S.C. § 3624 Is Ambiguous

The Respondent first submits that various provisions of § 3624 conflict with one another, and therefore are ambiguous.

"Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 519 U.S. 337,340 (1997)

Thus, the first proper inquiry is

whether or not the statute is plain and unambiguous. However, unlike the United States' argument would seem to suggest, this Court is not limited to reviewing solely the language of 18 U.S.C. § 3624(e) in making its determination. Rather, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." 519 U.S. at 341 As this Court found in the case of *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 113 S.Ct. 2173 (1993), "[o]ver and over we have stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." 508 U.S. at 455

The Respondent submits that when the entire statute is reviewed, the provisions

of § 3624 are found to be ambiguous, and not coherent and consistent with one another. Specifically, provisions (a) and (e) of the statute are in conflict, and create an ambiguity which has split the circuits.

Particularly, 18 U.S.C. § 3624(a) provides that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment. . ." The Sixth Circuit, in deciding the case below, determined that to give § 3624(e) a literal interpretation would be in contradiction to this subsection of the statute. The court reasoned that provision (a) "embodies Congress's intent that a prisoner not be held in prison following the expiration of a valid prison term." *Johnson v. United States*, 154 F.3d 569,571 (6th C. 1998)

The Ninth Circuit came to a similar conclusion in the case of *United States v. Blake*. 88 F.3d 824 (9th C. 1996) The court

in that case was reviewing a Guideline which had been given retroactive application. The court reasoned that Congress (through the Sentencing Commission), would not have made the Guideline amendment retroactive unless it intended that some relief could be provided. The court further found that subsections (a) and (e) of § 3624 were contrary to one another, and that lenity required favorable application to the defendant.

In the main case cited by the United States, the First Circuit held that 18 U.S.C. § 3624(e) requires that no credit be given against supervised release for time spent incarcerated. *United States v. Joseph*, 109 F.3d 34,37 (1st C. 1997) However, the First Circuit relied solely on the language of § 3624(e), and did not undertake an analysis of the interplay between §§ (a) and (e). Instead, and despite the court's sympathy for the

equitable argument that credit should be given, the court simply reverted to the language of subsection (e) as the beginning and end of its analysis. *Id.*

Although the Respondent recognizes that a division of judicial authority alone does not create ambiguity (*Reno v. Koray*, 515 U.S. 50, 115 S.Ct. 2021 (1995)), the Respondent submits that the several courts' analyses of the various subsections of § 3624 provide some evidence that the statute is not as clear as the United States would suggest. Rather, when subsections (a) and (e) are read together, and then applied to a situation such as the Respondent's, a clear anomaly results which proves the ambiguity of the statute.

If the Court finds the statute to be ambiguous, then it must uphold the relief granted by the Sixth Circuit. As this Court found in *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515 (1971), "where there is ambiguity in a criminal statute, doubts

are resolved in favor of the defendant." 404 U.S. at 348 Lenity requires using a construction resulting in a shorter sentence. *United States v. R.L.C.*, 503 U.S. 291,305, 112 S.Ct. 1329,1338 (1992) Therefore, if this Court finds the statute to be ambiguous, as it must, the relief granted by the Sixth Circuit was proper, and should be upheld.

B. A Literal Interpretation Of 18 U.S.C. § 3624(e) Is At Odds With Congressional Intent

The Respondent would also submit that a literal interpretation of 18 U.S.C. § 3624(e) is at odds with Congress's clear intent to allow appeals from Guidelines determinations.

In the case of *United States v. Ron Pair Enterprises*, 489 U.S. 235, 109 S.Ct. 1026 (1989), this Court held that even where the meaning of a statute is plain, this Court may determine a different meaning to the statute where "the literal

application of a statute will produce a result demonstrably at odds with the intentions of its drafters." 489 U.S. at 242 The Court further found that "In such cases, the intention of the drafters, rather than the strict language, controls." *Id.*

A review of the entire P.L. 98-473 shows that Congress clearly intended to allow credit on supervised release, in the event a sentence was erroneously longer than it should have been.

Under 18 U.S.C. § 3742, Congress has issued a clear statement that it encourages appeals from an incorrect application of the Sentencing Guidelines. *18 U.S.C. § 3742(a)(2)* As the legislative history regarding § 3742 notes, "Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." *Comprehensive Crime*

Control Act of 1984, Pub.L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.1987) p.3334 Thus, it is clear that Congress intended to allow for full appellate review of guidelines determinations.

Further, it is also clear from the legislative history that Congress intended to provide for relief upon an appellate finding of an incorrect application of the Guidelines. As the legislative record clearly states "[t]he Committee intends that a sentence be subject to modification through the appellate process, though it is final for other purposes." *Id.* at p.3337

The import of these statements is that, if this Court upholds the United States' position regarding supervised release credit, then it will serve to moot a significant number of appeals that Congress otherwise clearly intended to allow. Indeed, every defendant who is serving a sentence imposed under the Guidelines of 3 years or less has the

possibility of having his appeal of a Guidelines issue mooted, depending on the swiftness of the appellate process. Under the United States' reading of 18 U.S.C. § 3624(e), any Guidelines appeal would become mooted upon the appellant's release from prison, because, regardless of the correctness or incorrectness of the district court's application of the Guidelines, the court of appeals could provide no relief.

In addition to the court of appeals decision in the instant case, several other circuits have also concluded that in order to provide meaningful relief under 18 U.S.C. § 3742, credit from a supervised release term is a valid exercise of judicial authority. In the case of *United States v. Cottman*, 142 F.3d 160 (3rd C. 1998), the Third Circuit addressed the issue of whether or not an appeal of the Guidelines issue was moot, based upon the appellant's release from prison. The court

recognized that if the challenge was successful, that he would be able to have credit on his supervised release term for the erroneous time spent incarcerated. *Id.* at 165 A similar result occurred in the case of *United States v. Fadayani*, 28 F.3d 1236 (D.C. Cir. 1994), where the court found that the appeal was not moot despite the appellants' release from prison because "if the appellants' sentences were reduced, each might be eligible for a credit against their period of supervised release for the excess time they spent in prison." *Id.* at 1241 *but see United States v. Ross*, 77 F.3d 1525,1549 (n. 6) (7th C. 1996)

The above cases present concrete examples of Congress's intent (under 18 U.S.C. § 3742) to allow sucn appeals from Guidelines determinations. The Respondent submits that it is clear from the legislative history of § 3742 that Congress did not intend a result which would moot cases such as the Respondents. Therefore,

to read the statute literally in this instance is to thwart Congressional intent, and to render superfluous § 3742 for a significant number of defendants. "Our cases consistently have expressed `a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" *Freytag v. C.I.R.*, 501 U.S. 868,877 , 111 S.Ct. 2631,2638 (1991)(internal cite omitted) On this basis, the Court of Appeals decision should be upheld.

Application of § 3624(e) as the United States suggests would also be in contradiction to Congress's intent under 28 U.S.C. § 2255. That statute allows a defendant to challenge his conviction and/or sentence, while the defendant is "in custody". *28 U.S.C. § 2255* This Court has long held that a defendant is "in custody" if he is on parole, as even though the defendant is not incarcerated, he is still under constraints of the sentence. *Jones v.*

Cunningham, 371 U.S. 236 (1963)

If in fact no relief could be provided after the defendant is released from prison, this Court would not have expanded the "in custody" requirement beyond incarceration. Clearly, Congress intended a defendant to obtain relief from his conviction or sentence under 28 U.S.C. § 2255.

Therefore, the intention of Congress through 28 U.S.C. § 2255 and 18 U.S.C. § 3742 was to allow the type of relief granted in the instant case.

C. The Result Suggested By The United States Would Be In Contravention To This Court's Prior Precedent

In the case of *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543 (1984), the defendant argued that he should receive a lower sentence, as the state did not specifically perform all aspects of his plea agreement, which caused a higher than warranted sentence. Prior to disposition

of the appellate process, the defendant was released on parole. The issue of mootness was therefore raised for this Court's attention.

The Court determined that the case was not moot. Specifically, the Court noted that the outcome of the defendant's challenge to his sentence could affect the date on which parole would expire, and thus, the matter was not moot. 467 U.S. at 511

The Respondent recognizes that the *Mabry* case was based on Arkansas parole law. However, the rationale is the applicable to the present dispute. The *Mabry* Court would not have heard the case unless some relief could have been granted. Using the same rationale is as used by the United States in this case, a defendant cannot be incarcerated and on parole for the same offense at the same time. Obviously, this Court determined that relief could be granted, in the form of

credit off of parole to be served, even though the "credit" came from the sentence, and not the parole term. This rationale should be upheld in the present case.

D. The Purposes Of Continued Supervised Release Would Not Be Served In The Present Case

The United States argues that no credit should be given against the Respondent's supervised release, because the purposes of supervised release and imprisonment are different, and providing such credit would undermine society's value of supervised release.

First, it should be noted that supervised release is a form of punishment. As the Third Circuit has found "Supervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act." *United States v. Dozier*, 119 F.3d 239,242 (3rd C. 1997) Therefore, simply because the punishment is not identical to

incarceration does not mean that credit cannot be given.

Further, and more importantly, the goals listed by the United States as being important distinctions have no relevance in the Respondent's case. The Court of Appeals decided this matter on August 26, 1998. Since that time, the Respondent has not been subject to supervised release. Thus, for over one year, the Respondent has been fully and successfully re-integrated into society. It would not serve any purpose, at this point, to re-impose a term of supervised release as to the Respondent, as none of the goals suggested by the United States as purposes for continued supervision are present.

In short, the Respondent submits that incarceration and supervised release are not so dissimilar that time spent under the more severe restraint cannot be credited against the other. In addition, no reason exists to re-impose supervised release in

the present case. Thus, the Sixth Circuit's opinion should be upheld.

E. Petitioner's Reliance On 18 U.S.C. § 3583 Is Unavailing

The United States suggests that the relief granted by the Sixth Circuit in this case is not warranted, because 18 U.S.C. § 3583 provides a basis for relief from supervised release.

18 U.S.C. § 3583(e) allows a defendant's supervised release to be terminated by the sentencing court upon the expiration of 1 year of supervised release. Thus, the defendant must serve an entire year of supervised release before he or she can request such relief. Second, the criteria for relief is based upon the defendant's conduct while on release.

This statute does not provide meaningful relief for defendants such as the Respondent. The Respondent served 2 and one half years incarcerated beyond what he was required to serve under the law.

His term of supervised release was 3 years. Therefore, if courts can grant credit for time served against supervised release, the Respondent's supervised release would have lasted approximately six months. Under the scenario suggested by the United States, he would have to serve an entire year before even becoming eligible for relief.

Further, there is no guarantee that the Respondent will obtain the relief he would seek under 18 U.S.C. § 3583(e). As the Fifth Circuit noted in *United States v. Jeanes*, 150 F.3d 483 (5th C. 1998), the sentencing court retains "broad discretion" in determining these requests. *Id.* at 484 Therefore, relief is far from a certainty.

The Respondent submits that 18 U.S.C. § 3583(e) does not provide a sufficient basis for relief from term of incarceration wrongfully served. The only appropriate relief is the relief granted by the Sixth Circuit in this matter.

"The decisions of this Court havee repeatedly warned against the dangers of an approach to statutory construction whiich confined itself to the bare words of tthe statute [internal cite omitted], for literalness may strangle meaning." *Lynnch v. Overholser*, 369 U.S. 705, , 82 S.Ct. 1063,1067 (1962) The Respondent submitts that the full language of the enactmennt, as well as the legislative history, expreess an intent to allow relief from a wrongfullly imposed sentence. This Court should therefore uphold the decision of the Sixth Circuit, as it comports with the intennt of Congress, and is fundamentally fair.

CONCLUSION

The Respondent requests that this Court uphold the finding of the Court of Appeals in this matter.

Respectfully submitted,

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